Supreme Court, U.S.
FILED
APR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

ORIGINAL

NO. 87-6405

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

CHARLES A. PALMER*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to give Tomplins' requested jury instructions on the lesser included offenses of involuntary manslaughter and criminally negligent homicide.

2. Whether the prosecution rebutted Tompkins' claim under Batson v. Kentucky, 476 U.S. ___, 106 S.Ct. 1712 (1986).

3. Whether the Texas capital sentencing scheme is constitutionally infirm.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Course of Proceedings and Disposition Below	2
B. Statement of Facts	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	3
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	3
II. TOMPKINS WAS NOT ENTITLED, AS A MATTER OF STATUTORY CONSTRUCTION OF TEXAS LAW, TO AN INSTRUCTION ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.	3
III. THE PROSECUTION REBUTTED TOMPKINS' CLAIM UNDER BATSON V. KENTUCKY, ___ U.S. ___, 106 S.CT. 1712 (1986)	6
IV. TOMPKINS' CHALLENGE TO THE TEXAS STATUTORY SCHEME IS NOT PROPERLY BEFORE THIS COURT.	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986)	3,6
Beck v. Alabama, 477 U.S. 625 (1980)	3,4,5
Franklin v. Lynaugh, No. 87-5546	3,7
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	5
Hopper v. Evans, 456 U.S. 605 (1982)	4,5
Smith v. Phillips, 455 U.S. 209 (1982)	4
Tacon v. Arizona, 410 U.S. 352 (1973)	4,6,7

Constitutions, Statutes and Rules	
U. S. Const., amend. V	2
U. S. Const., amend. VIII	2
U. S. Const., amend. XIV	2
28 U.S.C. § 1257(3)	2
Sup. Ct. R. 17	3
Tex. Code Crim. Proc. Ann. art. 37.071	2
Tex. Penal Code Ann. § 6.03	2
Tex. Penal Code Ann. § 19.02	2
Tex. Penal Code Ann. § 19.03	2
Tex. Penal Code Ann. § 19.05	2
Tex. Penal Code Ann. § 19.07	2

NO. 87-6405

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1987

PHILLIP D. TOMPKINS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals is attached to the petition as Appendix A. Tompkins v. State, ___ S.W.2d ___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987). Tompkins' motion for leave to file motion for rehearing was denied without written order.

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Tompkins."

JURISDICTION

Tompkins seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Tompkins bases his claims on the fifth, eighth and fourteenth amendments to the United States Constitution. Also involved herein are Tex. Code Crim. Proc. Ann. art. 37.071 and Tex. Penal Code Ann. §§ 6.03, 19.02, 19.03, 19.05 and 19.07, copies of which are attached to the petition as Appendix D.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

On January 30, 1981, Tompkins was indicted for the capital murder of Mary D. Berry. The indictment alleged that on or about January 26, 1981, Tompkins killed Berry while in the course of committing and attempting to commit the offenses of robbery and kidnapping of Berry. Tompkins pled not guilty and was tried by a jury, which, on June 11, 1981, found him guilty as charged. On June 15, 1981, following a separate hearing on punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071, and thereafter the trial court assessed punishment of death. On October 7, 1987, the Court of Criminal Appeals affirmed the conviction. Tompkins v. State, ___ S.W.2d ___, No. 68,870 (Tex. Crim. App. Oct. 7, 1987).

B. Statement of Facts

The state is in substantial agreement with Tompkins' statement of the facts.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the questions presented.

Tompkins' claim that the trial court erred in failing to instruct the jury on two lesser included offenses is without merit. The court below found, as a matter of statutory construction of Texas law, that such offenses were not raised by the evidence, and this Court should defer to the Texas court's

interpretation of state law. Moreover, the jury was afforded the opportunity to convict Tompkins of a non-capital offense inasmuch as the trial court did give an instruction on the lesser included offense of murder.

Tompkins' claim under Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), is also meritless. Both the trial court and the state appellate court below specifically found that the prosecutor's explanations for the exercise of his peremptory challenges sufficiently rebutted Tompkins' prima facie Batson claim. Tompkins asks this Court to grant certiorari merely to review the factual findings and credibility choices of the courts below.

Finally, there is no merit to Tompkins' attempt to bring his case within the ambit of Franklin v. Lynaugh, No. 87-5546, currently pending in this Court. Tompkins raised no such claim in the court below and his trial court challenge to the constitutionality of the Texas capital sentencing scheme was on grounds other than those presented in Franklin. Thus, this Court is without jurisdiction to consider this claim.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Tompkins has advanced no special or important reason in this case, and none exists.

II.

TOMPKINS WAS NOT ENTITLED, AS A MATTER OF STATUTORY CONSTRUCTION OF TEXAS LAW, TO AN INSTRUCTION ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

Tompkins, relying on Beck v. Alabama, 477 U.S. 625 (1980), argues that the trial court erred in refusing his requested instructions on the lesser included offenses of involuntary

manslaughter and criminally negligent homicide. In Beck, the Court held that a sentence of death could not be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included noncapital offense, where the evidence would have supported such a verdict. The Court struck down an Alabama preclusion clause which proscribed the giving of such an instruction in capital cases, finding that it introduced "a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Id. at 643. In Beck, there was no question that the defendant would have been entitled to such an instruction but for Alabama's preclusion clause. Id. at 629-30.

Subsequently, in Hopper v. Evans, 456 U.S. 605 (1982), the Court made clear that "due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction." Id. at 611 (original emphasis). There, the Court concluded that no such instruction had been required because there was no evidence to support it.

Here, the Texas appellate court found, as a matter of state law, that the evidence adduced at trial did not raise the lesser included offenses of involuntary manslaughter and criminally negligent homicide. Appendix A at 21-25. Thus, Tompkins' request for certiorari review of this issue should be denied for two reasons. First, it is nothing more than an invitation to this Court to second-guess the Texas court's interpretation of its own law, an undertaking which is outside the ambit of the Court's certiorari jurisdiction. See Smith v. Phillips, 455 U.S. 209, 221 (1982) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.").

Second, Tompkins' claim concerns only the application of Beck and Hopper to his particular factual situation. This Court sits to decide important, novel or recurring questions, not rulings founded on settled principles of law. Tacon v. Arizona,

410 U.S. 352, 353 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

Moreover, even if the court below decided this matter incorrectly as a matter of Texas law, the writ should not issue because Tompkins could not have been prejudiced by the trial court's refusal of his requested instructions. The rationale of Beck is that, when raised by the evidence, a lesser included offense must be submitted to the jury as "a third option of finding that although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment." Hopper, 456 U.S. at 609. Here, the jury was given the third option of finding Tompkins guilty of the lesser included offense of murder (See Petition at 12). Due process was thus satisfied. The Constitution does not require that the jury be instructed on every conceivable lesser included offense. See Beck, 447 U.S. at 630 n.5.

Finally, Tompkins misrepresents the holding of the court below in asserting that the Texas court read "Beck to require that the defendant testify or present evidence in order to receive the protections of Beck." (Petition at 11). In fact, the Texas rule is directly contrary to that suggested by Tompkins:

> In determining whether a defendant is entitled to a charge on a lesser included offense, this Court considers all the evidence presented. If evidence from any source raises the issue of a lesser included offense an instruction on that offense must be included in the court's charge to the jury.

(Appendix A at 20) (citations omitted). Rather than requiring that a defendant testify or present evidence to create a Beck issue, as Tompkins suggests, the Texas court simply observed that in Beck the issue was raised by the defendant's testimony, whereas here there was no evidence which raised the issue.

III.

THE PROSECUTION REBUTTED TOMPKINS' CLAIM UNDER BATSON V. KENTUCKY, ___ U.S. ___, 106 S.CT. 1712 (1986).

Under Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), once a criminal defendant establishes a prima facie showing of racial discrimination in the prosecutor's exercise of his peremptory challenges, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." Id. at ___, 106 S.Ct. at 1723. Here, the court below found that Tompkins had established a prima facie case, but that it had been rebutted because "the prosecuting attorneys articulated at the hearing racially neutral explanations, which were both plausible and unambiguous, for exercising their peremptories on the five complained about venirepersons." Appendix A at 9. In so holding, the court adhered to the well settled rule of appellate review that "[w]e do not substitute our judgment of the witnesses' credibility and evidentiary weight for those of the factfinder, but affirm those judgments whenever the record discloses sufficient evidence in their support." Id. at 7.

Tompkins does not, because he cannot, argue that the court below applied an improper constitutional standard. Instead, he asserts that the Texas appellate court should not have deferred to the trial court's credibility determinations because of other, "objective evidence" in the record which, he argues, cast doubt on the prosecutor's explanations. This disingenuous argument ignores one salient fact, i.e., that the "objective evidence" upon which Tompkins relies never was presented to the trial court for its consideration. Thus, in refusing to consider this evidence, the court below did nothing more than adhere to the time-honored rule that an appellate court will not consider matters not raised in the court below, a rule to which this Court has consistently followed. E.g., Tacon v. Arizona, supra.

IV.

TOMPKINS' CHALLENGE TO THE TEXAS STATUTORY SCHEME IS NOT PROPERLY BEFORE THIS COURT.

Tompkins contends that "[t]his case also presents an issue identical to the issue currently before the Court in Franklin v. Lynaugh, . . . " No. 87-5546. Again, Tompkins asks the Court to consider an issue not raised in the court below. Indeed, Tompkins concedes as much (Petition at 6, 23).

Moreover, even the issue which Tompkins raised at the trial court level is not the same as that in Franklin. At trial, Tompkins moved to quash the indictment on grounds wholly unrelated to Franklin (Transcript, hereinafter "Tr.," at 113). Tompkins also filed a motion to have the Texas capital sentencing statute declared unconstitutional (Tr. 99). Neither instrument raised the issue posed in Franklin, i.e., whether the trial court must specifically instruct the jury to consider certain evidence as mitigating. Finally, Tompkins' citation to pages 9-31 of Volume IV of the record (Petition at 6, 23) apparently is in error, as the undersigned has examined the original record, and no such motion or ruling is found on those pages. Because the question presented in Tompkins' petition in this Court was not raised in the trial court or the appellate court below, this Court is without jurisdiction to consider it. Tacon v. Arizona, supra.

CONCLUSION

For these reasons, the state respectfully request that the petition for writ of certiorari be denied.

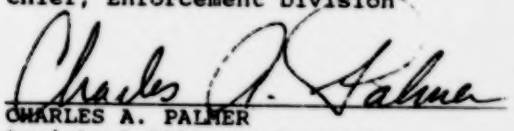
Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

LOU McCREARY
Executive Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division



CHARLES A. PALMER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT